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SUPERIOR COURT

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DOCKET NO. HHB-CV-21-6063734-S

JUDICIAL DISTRICT OF

SUPERIOR COURT

PLANNED DEVELOPMENT ALLIANCE
OF NORTHWEST CONNECTICUT, ET AL.

NEW BRITAIN

JUDICIAL DISTRICT OF
NEW BRITAIN

ADMINISTRATIVE APPEALS

VS.

CONNECTICUT SITING COUNCIL, ET AL.

OCTOBER 19, 2021

MEMORANDUM OF DECISION

INTRODUCTION:

This matter is an administrative appeal of a final decision taken by the Connecticut Siting Council (Siting Council) approving the installation of a cell tower in Siting Council docket no. 488 entitled Homeland Towers, LLC and New Cingular Wireless PCS, LLC d/b/a AT&T application for a Certificate of Environmental Compatibility and Public Need for the construction, maintenance, and operation of a telecommunications facility located at one of two sites: Kent Tax Assessor ID M10, Block 22, Lot 38 Bald Hill Road or 93 Richards Road, Kent, Connecticut (Final Decision). The Final Decision approved the installation of a cell tower at 93 Richards Road in Kent. The plaintiffs, Planned Development Alliance of Northwest Connecticut, Inc. (PDA) and Spectacle Ridge Association, Inc. (SRA), appealed the Final Decision to this court. PDA and SRA are organizations whose members own property in close proximity to the

*Electronic notice sent to all counsel present
and reporter of judicial decisions. G. Jordan*

proposed cell tower site, and which participated in the administrative proceeding below as party interveners pursuant to General Statutes § 22a-19.¹

FACTS AND PROCEDURAL HISTORY:

Homeland Towers LLC and New Cingular Wireless PCS LLC d/b/a AT&T (collectively, Applicants), filed an application with the Siting Council on February 28, 2020 seeking approval for the installation of a cell tower in Kent at one of two sites. The plaintiffs were allowed by the Siting Council to become party interveners and participate in the administrative process concerning the Applicants' application. The Siting Council conducted hearings on multiple days in July, August and September of 2020. On December 7, 2020, the Siting Council issued its Final Decision approving the cell tower installation at 93 Richards Road in Kent. The plaintiffs have now appealed the Final Decision to this court.

There is no dispute over the following facts. Kent is a rural, and particularly beautiful part of the state with natural scenic vistas that are widely known, appreciated and prized. In the area of Kent, there is a substantial gap in cell service. The approved cell tower will fill that gap in cell service and will provide a broadband network, called FirstNet, to emergency first responders in the area. The area around Kent is mountainous, rural and heavily forested, and the

¹ The plaintiffs have filed a single brief on behalf of both plaintiffs.

foregoing characteristics of the area present challenges in providing reliable and continuous cell coverage. The installation of the sought-after cell tower is a “facility” within the meaning of General Statutes § 16-50i and is within the Siting Council’s jurisdiction pursuant to § 16-50i (a) (6).

The plaintiffs do not challenge the need for expanded reliable cell service in the Kent area. The plaintiffs challenge the manner in which that expanded cell service is achieved. The plaintiffs assert that the Applicants should have sought, and the Siting Council should have approved, an array of small cell antennas instead of a macro tower, or that the Siting Council should have denied approval of the macro tower.² The plaintiffs assert that small cell antenna arrays would have met the public need without damaging the scenic vistas of Kent as the macro tower does. Accordingly, the plaintiffs do not challenge the public need for improved cell service, but assert that the need could have been met in a better way. The plaintiffs presented a plan for meeting the need using small cell antennas to the Siting Council during the hearings.

The Siting Council explicitly considered the use of small cell antennas instead of a macro tower but rejected the idea, finding that small cell antennas would not reliably and reasonably meet the public need in the rural mountainous forested terrain of Kent. The Siting Council also determined that a small cell antenna array would not reliably provide the FirstNet emergency

² The plaintiffs opposed the installation of a macro tower at either proposed location.

network service. Accordingly, the Siting Council considered and rejected the plaintiffs' proposed solution. See Final Decision findings of fact numbers 82 and 89-90.

STANDARD OF REVIEW:

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.³ This court's jurisdiction over appeals of Siting Council decisions arises out of General Statutes § 16-50q, which refers to and incorporates § 4-183. Judicial review of an administrative decision in an appeal under the UAPA is limited. *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the

³ Section 4-183 (j) provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings."

evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion.” (Internal quotation marks omitted.) *Id.*

Although the courts ordinarily afford deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute’s purposes, “[c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion.” (Internal quotation marks omitted.) *Dept. of Public Safety v. Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

AGGRIEVEMENT:

The plaintiffs were granted intervener status as parties pursuant to § 22a-19 in the administrative proceedings below by the Siting Council. Our Supreme Court has explained that entities that have been granted intervener party status pursuant to § 22a-19 have standing to raise environmental issues within the jurisdiction of the agency conducting the proceeding. See *Nizzardo v. State Traffic Commission*, 259 Conn. 131, 148, 788 A.2d 1158 (2002). This is exactly what the plaintiffs here have done. The plaintiffs’ position is that the Siting Council should have met the public need and protected the scenic vistas of Kent by requiring the Applicants to use small cell antenna technology instead of a macro tower, or denied approval of the macro tower. Thus, the plaintiffs advocate the protection of scenic vistas, which is an

environmental issue within the scope of § 22a-19.⁴ The foregoing environmental concerns are within the Siting Council's jurisdiction and mandate to consider pursuant to General Statutes § 16-50p.

In addition to the foregoing, the plaintiffs are organizations comprised of owners of land that is nearby to the cell tower installation.⁵ At the court hearing on this matter, Mr. Avi Rosenbluth, a member of SRA, testified concerning classical aggrievement. Mr. Rosenbluth testified that he lives one lot away from the proposed cell tower facility, and that his neighbor, Mr. Wagner lives immediately next door to the facility. Mr. Rosenbluth testified that both he and his neighbor will have direct, close up, views of the cell tower which will mar the otherwise scenic natural beauty of the views from his home and that of Mr. Wagner. Mr. Rosenbluth further testified that the close up, direct views of the cell tower will substantially impair his enjoyment of his land. Mr. Rosenbluth further testified that, although others who are further away from the cell tower will be able to see it, his continuous close up direct view of it will be more detrimental to him.

⁴ Section 22a-19 (a) (1) promotes review of "conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state."

⁵ One member of SRA, Mr. Wagner, is an abutting landowner to the site of the approved cell tower installation. Another member of SRA, Mr. Rosenbluth, owns a home that is one lot away from the facility.

It is reasonable to conclude that the installation of a 135 foot cell tower on land immediately adjacent to the SRA plaintiffs will have an impact upon the value of the SRA plaintiffs' land. In addition, the destruction of the scenic views by the tower will impact the SRA plaintiffs more concretely than the public in general because the SRA plaintiffs live nearby and will be subjected to constant ongoing up close views of the tower, where the view was once one of natural beauty. The court notes that these impacts to these plaintiffs are clearly more concrete and direct than the impacts to the public in general because the general public may only occasionally be subjected to a distant view of the tower and will not be subject to impacts to land value.⁶ The foregoing effects of the Final Decision, and the facility that it approves, present a specific personal and legal interest for the SRA plaintiffs, that is distinguishable from the effect upon the general public, and which specific personal and legal interest is injured thereby.

In view of the foregoing, the court finds that PDA is statutorily aggrieved, and that SRA is both statutorily and classically aggrieved.⁷

⁶ It appears readily apparent to the court, as was confirmed by Mr. Rosenbluth's testimony, that it would be a very unusual person who would intentionally choose, and enjoy, to live directly nearby to a 135 foot cell tower which is in plain view. It also seems readily apparent to the court that a change in the close up direct view from one's home from a view of serene scenic beauty to a view of a 135 foot cell tower would be both displeasing to the resident and impactful on the value of the home. It further appears readily apparent to the court that a continuous, close up view of a 135 foot cell tower is different from an occasional distant view of the same tower.

⁷ The Siting Council agrees that the plaintiffs are statutorily aggrieved to the extent necessary to present environmental issues. See page 16 of the Siting Council brief. The plaintiffs have indeed only presented environmental issues in this appeal, namely protection of scenic natural vistas.

ANALYSIS:

As noted, this is an administrative appeal taken pursuant to § 4-183. Section 4-183 (j) provides the standard of review and instructs that: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable in view of applicable law.

The plaintiffs' appeal to this court asserts two errors allegedly made by the Siting Council in its Final Decision. First, the plaintiffs assert that the Siting Council should have required the Applicants to fill the acknowledged need for better cell coverage in Kent by using an array of small cell antennas instead of a macro tower because the small cell antenna array would not impact the scenic vistas, or the Siting Council should have denied approval of the macro tower. Second, the plaintiffs assert that, if the Siting Council was going to choose a macro tower, it should have set the maximum height at about 100 feet instead of 135 feet because a 100 foot tower would have filled the need with less impact on the scenic vistas. As can be readily perceived, both of the foregoing issues are factually driven issues that ultimately require the weighing of evidence and the balancing of factually based considerations.

It is clear that the Siting Council considered the small cell antenna array as proposed by the plaintiffs. The record contains substantial evidence supporting the Siting Council's rejection

of this proposal. The Applicants' expert testified that the small cell antenna array option would not provide signal coverage equivalent to the coverage provided by the macro tower approach, particularly in the mountainous forested terrain of Kent.⁸ He further testified that a small cell antenna array would not provide the coverage necessary for the FirstNet service. The plaintiffs' expert testified that he was unaware of the use of a small cell antenna array in another rural mountainous forested area like Kent. The plaintiffs' expert also admitted that he had never actually designed a small cell antenna array for a wireless communications company. The foregoing evidence is substantial evidence in support of the conclusion that a small cell antenna array would not reliably fill the public need for expanded cell service in the Kent area.⁹ The Siting Council concluded that a small cell antenna array was not feasible to provide the expanded cell service needed in the Kent area. See Final Decision findings of facts numbers 82 and 89-90. The foregoing finding is supported by substantial evidence in the record and is not unreasonable.

⁸ Both mountains and trees attenuate cell phone signals.

⁹ The record contains evidence that a small cell antenna array would not provide equivalent cell coverage to that of a tower, particularly in reaching homes located among the mountains and trees of Kent. Further, the reliability and effectiveness of a small cell antenna array in a mountainous rural forested area such as Kent appears to be in question in view of the lack of evidence of a similar deployment of such technology in a similarly mountainous rural forested area. The record does contain substantial evidence that small cell antenna array coverage would be limited to a ribbon of coverage along the roads where it is deployed.

The Siting Council also explicitly considered the effect of the macro tower on the scenic vistas of Kent, and took mitigation steps that it believed were appropriate in choosing the particular site, the maximum height of the tower, the monopole type of tower and the two-tone painting scheme. The Siting Council's decision to set the maximum height at 135 feet arose from consideration of the functionality of the tower in Kent's terrain as weighed against the environmental impact.¹⁰ The record and the Final Decision make it clear that the Siting Council considered public need, functionality, reliability, cost and environmental impact. This weighing of evidence and making value judgments using the appropriate considerations are functions entrusted by statute to the Siting Council.¹¹

In making its Final Decision, §16-50p required the Siting Council to consider the "scenic, historic and recreational values" of the site in question.¹² Further, §16-50p (b) (1) provides that "The council may deny an application for a certificate if it determines that . . . (iii) the proposed

¹⁰ The court notes that the 135 foot height set by the Siting Council was a reduction from the height requested by the Applicants. Further, the record contains substantial evidence that shorter tower heights negatively impacted coverage.

¹¹ It is this very balancing of evidence and making value judgments that the plaintiffs attack. Such an attack is strictly limited by the standard of review, for if the record contains substantial evidence supporting the Siting Council's findings of fact, and if the conclusions drawn by the Siting Council are reasonable in view of the facts found and the applicable law, then the administrative decision must stand, despite the possibility that other facts could have been found and/or other conclusions reached. The Siting Council is the finder of fact, and the authorizing statutes place the responsibility for weighing evidence and making value judgments with the Siting Council.

¹² The Siting Council understood that the area was designated as a National Heritage Area. See Final Decision finding of fact number 166.

facility would substantially affect the scenic quality of its location or surrounding neighborhood and no public safety concerns require that the proposed facility be constructed in such a location.” Upon review of the record and the Final Decision the court finds that the Siting Council considered the foregoing factors. The Siting Council determined that there was a substantial public need for more continuous and uniform cell signal coverage in the Kent area. The plaintiffs do not contest the foregoing finding. The Siting Council also found that there was a significant public safety concern arising out of the lack of continuous and uniform cell service in the Kent area, and arising out of a lack of FirstNet services in the area. In this era of ubiquitous communication, it is not a stretch to conclude that lack of cell service in wide swaths of rural area poses a danger to the public which has come to depend upon easy access to communication. Further, lack of dedicated reliable emergency responder communication services also poses a danger, particularly since even our emergency responders have come to depend and plan upon easy access to communication. Given the foregoing, the court finds that the record contains substantial evidence, and the Final Decision contains findings, that support the Siting Council’s conclusion that filling the substantial public need and resolving safety concerns, as prescribed by the Siting Council here, outweighed the impact upon the scenic vistas, particularly when the Siting Council’s required mitigations are employed.

The plaintiffs argue that the Siting Council should have chosen the least intrusive means of satisfying the public need. The court does not find the foregoing requirement in the applicable

statutes.¹³ Instead, § 16-50p provides an extensive list of factors that the Siting Council is required to consider and weigh. In its consideration of the factors provided for in § 16-50p, the Siting Council is implicitly considering whether the proposed installation poses unreasonable harm to the environment and whether or not there are feasible and prudent alternatives.¹⁴ In this matter, the Siting Council clearly considered the possibility of using a small cell antenna array instead of a macro tower. Upon weighing the evidence, advantages, disadvantages and dangers, the Siting Council concluded that a small cell antenna array was not feasible in the terrain around Kent, would not provide the coverage that a macro tower would provide, would not provide the FirstNet services that a macro tower would provide, and would not be as reliable as a macro tower. Further, the Siting Council found no assurance that the implementation of a small cell antenna array had actually been accomplished in a rural mountainous forested area such as Kent. In view of the foregoing findings, the use of a small cell antenna array was not a feasible alternative and would not have met the public need or the safety concerns. Accordingly, since there was a substantial public need and safety issues, and since the small cell antenna array was not a feasible alternative capable of addressing the foregoing in the Kent area, the macro tower

¹³ See General Statutes § 16-50w and General Statutes § 16-50x. See also *Corcoran v. Connecticut Siting Council*, 50 Conn. Supp. 443, 934 A.2d 870 (2006), *aff'd*, 284 Conn. 455, 934 A.2d 825 (2007). See also *FairwindCT, Inc. v. Connecticut Siting Council*, 313 Conn. 669, 697-702, 99 A.3d 1038 (2014).

¹⁴ The court notes the modifiers “unreasonable,” “feasible,” and “prudent.” These all require a weighing of evidence, advantages, disadvantages and dangers.

was the least intrusive means of meeting the established need and safety concerns.¹⁵ The court understands that the plaintiffs disagree with the foregoing conclusions, however, it was the Siting Council's responsibility and province to weigh the evidence presented and reach reasonable conclusions, which it did.

Finally, the Final Decision expressly make the following findings:

“In accordance with [§] 22a-19, the Council finds that the proposal would not cause unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state. The Council has considered all reasonable alternatives and finds that the proposal represents the best alternative consistent with the reasonable requirements of the public health, safety and welfare.”

The Final Decision also expressly provides that the environmental impacts, including scenic impacts, of the approved facility are not disproportionate when compared with the need and are not in conflict with the policies of the state. The court finds substantial evidence in the record to support the foregoing conclusions and finds that the conclusions are not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.¹⁶

In view of the foregoing, the court finds that the plaintiffs have failed to establish on appeal that the Final Decision of the Siting Council was (1) in violation of constitutional or

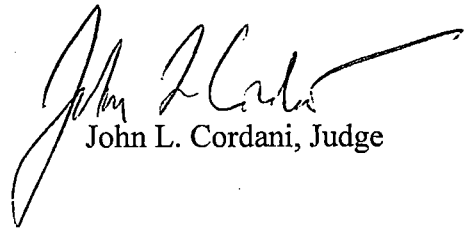
¹⁵ The Siting Council explicitly and intensively weighed the determined need against the environmental effects. See Final Decisions findings of fact numbers 157 through 214.

¹⁶ While it may have been possible to reach other conclusions based upon the evidence in the record, this court cannot substitute its judgment for that of the Siting Council when the standard of review is considered.

statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Accordingly, the court must affirm the Final Decision of the Siting Council and dismiss the appeal.

ORDER:

The court respectfully dismisses the plaintiffs' appeal.



John L. Cordani, Judge